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Cindy Chen

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NOTES

THE PRISON LITIGATION REFORM ACT OF 1995: DOING AWAY WITH MORE THAN JUST CRUNCHY PEANUT BUTTER

CINDY CHEN†

*It is ugly to be punishable, but there is no glory in punishing.
Hence that double system of protection that justice has set up
between itself and the punishment it imposes. Those who carry
out the penalty tend to become an autonomous sector; justice is
relieved of responsibility for it by a bureaucratic concealment of
the penalty itself.¹*

INTRODUCTION

Congress enacted the Prison Litigation Reform Act of 1995 (PLRA) to curb prisoner filings of frivolous lawsuits.² This Act has increased the erosion of prisoners' rights by making it more difficult for prisoners to file lawsuits in federal courts to vindicate their rights.³ This intrusion on prisoners' rights has not received much attention from the legislature because

† J.D. Candidate, June 2004, St. John's University School of Law; B.A., 2001, New York University.

¹ MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 10 (Alan Sheridan trans., 2d ed., Pantheon Books 1995) (1978).

² Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321-66-1321-77 (1996) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.); see also 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims.").

³ See Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 768 (2000) (asserting that the PLRA is a clear attempt at circumventing prisoners' rights).

prisoners' rights are usually last on the list of priorities for lawmakers.⁴

Most people, not just lawmakers, do not think much of prisoners. Simply put, prisoners are not popular people.⁵ By definition, a prisoner has committed a wrong that warrants a term of confinement.⁶ Through that confinement, a prisoner loses essential rights, most notably, his liberty and a degree of autonomy over the day-to-day decisions in his life.⁷ A prisoner, however, does not lose all his rights.⁸ The retained rights that are most relevant to the daily well being of a prisoner are those afforded by the Eighth Amendment.⁹ Under the Eighth Amendment, prisoners retain the right to have basic needs provided for during their confinement, including adequate ventilation, sanitation, and hygienic facilities.¹⁰ In short, the

⁴ Wendy Imatani Peloso, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1461 (1997) (noting that there is "no political downside to getting tough on prisoners" (quoting Bill Bergstrom, *More Inmates Actually Paying For Their Sins*, CHI. TRIB., Sept. 13, 1996, at C8)).

⁵ Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 117 (1997) (stating that it is a common fact that prisoners are not liked).

⁶ See generally NIGEL WALKER, *WHY PUNISH?* (1991), for a thorough discourse on the different goals, ideologies, and rationalization for state-instituted punishment.

⁷ See *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (concluding that imprisonment is equated with the loss of many significant rights); see also FOUCAULT, *supra* note 1, at 232 ("This 'self-evident' character of the prison, which we find so difficult to abandon, is based first of all on the simple form of 'deprivation of liberty.'").

⁸ See generally Stephen G. Dormer, *Prisoners' Rights: Substantive Rights Retained by Prisoners*, 85 GEO. L.J. 1561, 1561-1615 (1997) (listing the substantive rights retained by prisoners, including the right of access to courts and the right to have living conditions, medical care, and disciplinary treatment comport with Eighth Amendment standards against cruel and unusual punishment during confinement).

⁹ See Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1244 (1998) (noting that "the Eight Amendment right to be free from cruel and unusual punishment" is the only constitutional right that sets an "affirmative standard of care of prisoners"). See generally U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

¹⁰ See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("The Amendment also imposes duties on these officials, who must provide humane conditions of confinement . . . and must 'take reasonable measures to guarantee the safety of the inmates.'" (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984))).

Eighth Amendment mandates the humane treatment of a prisoner.¹¹

To safeguard their rights under the Eighth Amendment, prisoners file 42 U.S.C. § 1983 suits.¹² These suits often address almost every aspect of prison life because for prisoners, “eating, sleeping, dressing, washing, working and playing are all done under the watchful eye of the State.”¹³ Through the filing of such suits, prisoners help to reveal substandard conditions of confinement, which have included the abuse and neglect of prisoners by prison officials.¹⁴ Prisoner-initiated litigation, in sum, is an effective mechanism for revealing, addressing, and ameliorating constitutional violations.¹⁵ For example, recently in *Hope v. Pelzer*,¹⁶ the plaintiff-prisoner claimed that Alabama prison guards violated his Eighth Amendment rights when they handcuffed him to a hitching post twice and deprived him of

¹¹ See *id.*; see also *Pritchett v. Page*, No. 99 C 8174, 2000 WL 1129891, at *9 (N.D. Ill. Aug. 9, 2000) (asserting that “longstanding case law has ‘clearly established’ that prison officials may not subject prisoners to conditions of confinement that violate the Constitution”).

¹² The Civil Rights Act provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be [civilly] liable to the party injured

42 U.S.C. § 1983 (1996); see William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 610 (1979) (“Prisoners, like other people, may sue state and local officials under 42 U.S.C. § 1983, to redress the deprivation of federal constitutional rights.”) Originally, § 1983 only addressed deprivation of constitutional rights by state officials. Through its decision in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Supreme Court expanded § 1983 to include violations by federal officials. 403 U.S. 388, 392–97 (1971).

¹³ See Turner, *supra* note 12, at 611 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

¹⁴ See, e.g., *White v. Fauver*, 19 F. Supp. 2d 305, 307 (D. N.J. 1998) (describing the instant claim as a class action suit brought by plaintiff on behalf of all inmates at a New Jersey correctional facility, “alleging that prison officials engaged in a pattern of physical abuse, threats, and subjected plaintiffs to a series of unconstitutional living conditions”).

¹⁵ See Kristin L. Burns, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879, 880 (1997) (citing, for example, *Hutto v. Finley*, 437 U.S. 678, 682 (1978), where the Supreme Court found Eighth Amendment violations when “as many as ten or eleven inmates” were being housed indeterminately in “windowless, eight-by-ten-foot rooms containing merely a source of water and a toilet that could be flushed only from the outside”).

¹⁶ 536 U.S. 730 (2002).

bathroom breaks and water.¹⁷ To vindicate his rights, while also revealing unconstitutional treatment of prisoners, he filed § 1983 claims against the prison guards who administered the punishment.¹⁸ Prisoner litigation is one way to monitor and prevent such digressions toward brutality.¹⁹

When proponents of the PLRA urged for its passage, they did not see prisoner litigation as a method to safeguard standards of a civilized society.²⁰ Instead, they believed prisoner lawsuits were frivolous and a waste of resources.²¹ PLRA proponents often cite a case in which an inmate sued the state because he received a jar of crunchy peanut butter and not the creamy kind that he had ordered from the prison canteen (the "Peanut Butter Case") as a classic example of a frivolous prisoner suit.²² Proponents of the PLRA believed that all prisoner-brought litigation was as frivolous as the Peanut Butter Case.²³

Congress enacted the PLRA to curb prisoners' alleged abuse of the federal courts.²⁴ Through the PLRA, Congress changed

¹⁷ See *id.* at 733–35; accord *supra* notes 8–9 and accompanying text.

¹⁸ See *Hope*, 536 U.S. at 735.

¹⁹ See Burns, *supra* note 15, at 879 (quoting FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* 76 (Constance Garnett trans., 1957) ("The degree of civilization of a society is revealed by entering its prisons.")).

²⁰ 141 CONG. REC. S14626–28 (daily ed. Sept. 29, 1995) (statements of Sens. Dole, Reid, Thurman, and Hatch).

²¹ For example, Attorney General Jay Nixon has stated that prisoners filing too many unmeritorious suits cost Missouri more than \$1 million annually. Nixon and other Attorneys General have compiled a "top 10" list of ridiculous suits filed by prisoners, in particular suits filed by Missouri prisoners suing for butter instead of margarine and for salad bars and brunches on the weekends. See Tim Bryant, *Missouri Prisoners Lose Ruling on Frivolous Suits*, ST. LOUIS POST-DISPATCH, May 8, 1997, at 10A; see also Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, March 21, 1994, at A1 (discussing suits cited to be frivolous, including the case of the inmate who sued because he received crunchy peanut butter instead of the creamy kind).

²² See 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (including the Peanut Butter Case among the list of frivolous prisoner-brought lawsuits that inundate the federal dockets and waste legal resources); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 (1997) ("[C]onservatives won the battle of sound bites: law suits focusing on peanut butter sandwiches and premium cable became the central images rather than lawsuits that attempted to keep cells free of raw sewage.").

²³ See Bryant, *supra* note 21.

²⁴ See 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (noting that the purpose of the PLRA is to fix the problem with the overabundance of prisoner-brought lawsuits).

several statutes that govern the filing procedures for prisoner lawsuits.²⁵ Most notably, the PLRA changed 42 U.S.C. § 1997e, which governs the exhaustion of institutional grievance procedures, making it a mandatory pre-condition that prisoners exhaust all available administrative remedies provided within his or her prison's grievance procedures before filing a § 1983 action (the "Exhaustion Requirement").²⁶

This Note examines the exhaustion requirement under the PLRA and argues that it does not serve the intended purpose of easing the federal courts' workload. Rather, the PLRA has demonstrated the potential to bar meritorious prisoner claims. Furthermore, this Note advocates making the Exhaustion Requirement discretionary, rather than mandatory, so that the intended purpose of the PLRA can be served without barring meritorious claims. Under guided discretion, judges should be able to decide whether exhaustion is pragmatic on a case-by-case basis.

This Note does not argue that all prisoner lawsuits are meritorious, nor does it argue that the reduction of frivolous prisoner lawsuits is not a valid goal in light of the current federal dockets. Rather, this Note asserts that the PLRA's Exhaustion Requirement, in its present state, does not effectively achieve these goals without doing a great injustice to meritorious claims.

As enactment of the PLRA was largely a reactionary response to the rise of prisoner lawsuits and its impact on the federal docket, Part I of this Note examines the history and development of the concept of a prisoner lawsuit. Part II focuses on the legislative history of the PLRA and the rhetoric behind its passage. Part III examines how the application of the exhaustion requirement has not accomplished its intended goal,

²⁵ See Amanda A. Johnson & Megan Geunther, *Prisoners' Rights: Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 90 GEO. L.J. 2046, 2055–56 (noting that the enactment of the PLRA "constrain[ed] available relief and impos[ed] procedural barriers" for the filing of an inmate suit).

²⁶ That provision states:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (1996); see *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000) (recognizing that the PLRA makes exhaustion of administrative remedies a mandatory precondition for a prisoner-brought suit in a federal court).

while it may also have barred potentially meritorious claims. Finally, Part IV describes the proposed solution to the provision's shortcoming.

I. THE PRISONER LAWSUIT

At common law, a prisoner had no right to bring a lawsuit.²⁷ Prisoners were considered "slaves of the state," and confinement was deemed a moment of "civil death."²⁸ Before 1960, prisoners were not able to sue under § 1983 to remedy prison conditions.²⁹ The social atmosphere of the 1960s spurred a new judicial philosophy recognizing prisoners' rights, and courts became more receptive to prisoners' rights suits.³⁰ Before that, courts had traditionally followed the "hands off doctrine," giving great deference to prison administrators.³¹ There were several reasons for this change in judicial philosophy. Among them was the Warren Court's repudiation of the right-privilege distinction³²

²⁷ Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 422 (1993) ("[A]t common law a prisoner convicted of a felony could not bring suit.").

²⁸ WILLIAM L. SELKE, *PRISONS IN CRISIS* 28 (1993) ("[U]pon conviction and sentencing to a term of imprisonment, the inmate lost all rights and was under the absolute control of correctional authorities.").

²⁹ See Eisenberg, *supra* note 27, at 422 (discussing how the courts did not allow prisoners to use the Civil Rights Act to sue).

³⁰ For example:

The National Advisory Commission (1973) outlined the four basic areas of legal action in the prisoners' rights movement. These include (1) the right to access the courts and (2) First Amendment rights, as well as (3) rights related to the conditions of confinement and (4) the procedural practices of prison officials. . . . Indeed, the courts have come to play a role in the exasperating field of prison administration.

See SELKE, *supra* note 28, at 28.

The final reason the federal courts became more active in prisoner suits was that judges could no longer ignore the appalling condition of penal institutions in some states. Courts, mostly in the south, found that conditions in state prisons had become clear violations of the Eighth Amendment. In Florida, the district court found that prison conditions "endanger[ed] the very lives of the inmates" due to severe overcrowding and the deprivation of minimally adequate health care. The system exemplified "blatant deprivations of the [plaintiffs'] constitutional rights."

See Eisenberg, *supra* note 27, at 424 (quoting *Costello v. Wainwright*, 397 F. Supp. 20, 31, 34 (M.D. Fla. 1975), *vacated on other grounds* 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd*, 430 U.S. 325 (1977)).

³¹ See SELKE, *supra* note 28, at 28; see also Eisenberg *supra* note 27, at 422.

³² The right-privilege distinction supported the withholding of benefits that were denominated as privileges. Because a prisoner was entitled to nothing, everything was designated as a privilege, which did not lead to a constitutional

and the horrific conditions of many prisons.³³ These factors all eased the way for a prisoner to bring suit under § 1983. Once the floodgates were opened to prisoner litigation, it came in waves.³⁴

II. THE PLRA

Congress enacted the PLRA to deal with the rise of prisoner litigation in federal courts.³⁵ Admittedly, the number of lawsuits filed by prisoners is not low. In 2000, both state and federal prison inmates filed approximately 58,257 petitions in United States district courts,³⁶ reflecting a steady increase in the number of lawsuits filed by state and federal prisoners in federal courts.³⁷ PLRA proponents relied heavily on the rising number of prisoner-brought lawsuits to rally support its passage.³⁸

A. *Legislative History*

Despite the PLRA's impact on over one million prisoners, there is scant legislative history behind its enactment.³⁹ Congress passed the PLRA as a rider to the Omnibus Consolidated Rescission and Appropriations Act of 1996.⁴⁰ The debate and legislative processes leading to the passage of the PLRA were hasty, one-sided, and did not give much thought to the possible ramifications on prisoners' constitutional rights.

issue. See Eisenberg, *supra* note 27, at 423–24.

³³ See *id.* at 424 (discussing the “appalling condition of penal institutions” in many southern states).

³⁴ For example:

The combination of increased judicial activism, abrogation of long held legal doctrine, and the obviously deplorable conditions of many state penal institutions opened the door to prisoners seeking legal redress through section 1983 actions. The problem was that, once begun, it became difficult to stem the tide of such lawsuits.

See *id.* at 425.

³⁵ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558–60 (2003).

³⁶ See JOHN SCALIA, U.S. DEPT OF JUSTICE, PRISON PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf> (last visited Sept. 12, 2003).

³⁷ See *id.*

³⁸ 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (asserting that there was an “alarming explosion” in the number of prisoner lawsuits).

³⁹ See Riewe, *supra* note 5, at 119 (arguing that despite the broad scope of the Act, the PLRA was the subject of a single Judiciary Committee Hearing).

⁴⁰ See *id.*

After only one week of debate, the House passed its version on July 26, 1995.⁴¹ Similarly, the Senate debated the legislation for a mere five days before approving it.⁴² The bare legislative history clearly shows that there was "hardly the type of thorough review that a measure of this scope deserve[d]."⁴³

B. *The Rhetoric Behind the PLRA*

In support of the enactment of the PLRA, its proponents claimed that the federal courts were seriously burdened by overly litigious prisoners with frivolous suits.⁴⁴ Senator Bob Dole, a PLRA proponent, described the increased prisoner filings as an "alarming explosion."⁴⁵ Senator Dole attributed the increase in prison litigation to the alleged litigious nature of prisoners when he stated, "[P]risoners will now 'litigate at the drop of a hat.'"⁴⁶ Senator Dole failed, however, to address the drastic increase in prison population in the United States that accompanied the increase in prisoner filings when assessing the litigious nature of prisoners.⁴⁷ Moreover, Senator Dole failed to attribute the rise in prisoner-lawsuits to anything other than the mere litigious nature of prisoners.⁴⁸

The PLRA's proponents further trivialized the prisoner lawsuits when they declared that filing lawsuits has become a "recreational activity for long-term residents of our prisons."⁴⁹ Senator Hatch, another PLRA proponent, asserted that prisoner lawsuits were frivolous because "only a scant 3.1 percent have enough merit to reach trial."⁵⁰ Senator Hatch framed the merits

⁴¹ Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1659 (2002) (noting the brevity of the legislative process for the PLRA).

⁴² *Id.* at 1659-60.

⁴³ See 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) (criticizing the fact that the PLRA was the subject of a single hearing in the Judiciary Committee).

⁴⁴ See *id.* (stating that the PLRA's proponents view the legislation as "an attempt to reduce frivolous prisoner litigation").

⁴⁵ 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

⁴⁶ See 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) (quoting Chief Justice William Rehnquist).

⁴⁷ See SCALIA, *supra* note 36.

⁴⁸ See 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) (asserting that frivolous claims by prisoners are simply the result of their litigious nature).

⁴⁹ See 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

⁵⁰ See 141 CONG. REC. S18136 (daily ed. Dec. 7, 1995) (statement of Sen.

of a case solely on its ability to reach the trial stage.⁵¹ According to some commentators, however, a case is successful, or possesses merit, if "(1) the plaintiff wins after trial, (2) the parties settle their dispute, (3) the court grants a stipulated dismissal, or (4) the plaintiff dismisses the case voluntarily."⁵² Whether a case goes to trial is not, and should not be, the dispositive factor of the underlying merits of a case.

PLRA proponents further argue that prisoner-brought litigation poses a huge financial burden on the legal system.⁵³ According to Senator Abraham, another supporter of the PLRA, "[t]hirty-three States have estimated that they spend at least \$54.5 million annually combined on these lawsuits. The National Association of Attorneys General has extrapolated that number to conclude that the annual costs for all of these States are approximately \$81 million a year to battle" these cases.⁵⁴ The cases that Senator Abraham referred to included the Peanut Butter Case, an inmate suing because he was forced to listen to his unit manager's music, an inmate suing because his ice cream had melted, and an inmate suing because he was served cake that was "hacked up" for dinner.⁵⁵ Other PLRA proponents also listed cases that they deemed to be absurd, such as an inmate who demanded that he receive Reebok or L.A. Gear brand shoes instead of Converse,⁵⁶ an inmate who sued because his jeans did not fit properly, and an inmate who sued because he received shoes that were a size too large.⁵⁷ PLRA proponents deemed these cases, and their characterization of these cases, to be the sole prototype of prisoner litigation. Much of the PLRA's legislative history is comprised of proponents listing similar

Hatch).

⁵¹ See James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 144 (2000) (questioning whether Senator Hatch's standard for merit is correct).

⁵² See *id.* (quoting Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 681 (1987)).

⁵³ See Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 368 (1998) ("The result of these lawsuits has been to burden the federal court system and increase costs of administration.").

⁵⁴ 142 CONG. REC. S3703 (Apr. 19, 1996) (statement of Sen. Abraham).

⁵⁵ *Id.*

⁵⁶ See 141 CONG. REC. S14627 (Sept. 29, 1995) (statement of Sen. Hatch) (citing claims which he generalizes as typical prisoner-brought litigation).

⁵⁷ See *id.* (statement of Sen. Reid) (generalizing these claims to be typical prisoner brought litigation).

cases, and harping merely on the frivolity and abundance of such cases.⁵⁸

By merely advancing the view that prisoners are overly litigious and bring frivolous suits, PLRA proponents do a great disservice to prisoner litigation, which has undeniably helped to ameliorate prison conditions and to curb abuse of prisoners by exposing the problems that exist in prisons.⁵⁹ There are many legitimate cases not mentioned by PLRA proponents, including a case where guards at a Virginia state prison fired rubber pellets from a twelve-gauge shotgun on three separate occasions and severely wounded an inmate who, as a result, required hospitalization to remove the pellets from his face.⁶⁰ Another incident involved a jail guard that beat an inmate so severely that he was paralyzed for a year before dying from such injuries.⁶¹ These cases are merely a few examples of the numerous cases revealing the dire conditions of our nation's prison system, but they were never mentioned during the debate over the PLRA.⁶²

Moreover, prisoner lawsuits may not expend as many resources as claimed by PLRA proponents. Some prisoner advocates and scholars believe that the alleged burden caused by prisoner lawsuits is an exaggeration and that the so-called problem with excessive suits brought by prisoners is merely a myth.⁶³ According to these commentators, the alleged burden is exaggerated because frivolous and unmeritorious suits can be

⁵⁸ See, e.g., *id.* at S14626-29; 142 CONG. REC. S10576-78 (Sept. 16, 1996).

⁵⁹ See Kuzinski, *supra* note 53, at 363-64 (stating that prisoner lawsuits are necessary for the improvement of prison conditions, and often help to ameliorate such conditions and improve inmate treatment); see also Robertson, *supra* note 51, at 112 (noting that the net result of prisoner suits filed under § 1983 over the past two decades has been an improvement in jail and prison facilities).

⁶⁰ Frank Green, *7 Fighting Inmates Fired on*, RICHMOND TIMES-DISPATCH, Apr. 7, 1999, at B1. For an overview of the abuse of prisoners by prison officials see Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536 (2002), which provides an in-depth discussion on the types of abuse evident in penal institutions.

⁶¹ Bill Murphy, *Suit Alleges Guard Beat up Prisoner*, HOUSTON CHRON., June 17, 2000, at A41.

⁶² See *supra* notes 56-57 and accompanying text (referring to the debates on the Senate floor where various senators listed those cases that they felt were overly frivolous).

⁶³ See Dunn, *supra* note 21.

dismissed early in the process, and, therefore, they actually consume very little time and resources.⁶⁴

Contrary to the belief of PLRA proponents, some commentators give other reasons, besides the litigious prisoner, for the rise in the number of prisoner lawsuits. These commentators believe that the increase in prisoner lawsuits may be symptomatic of deteriorating prison conditions, rather than prisoners' propensity for litigation.⁶⁵ According to Erwin Chemerinsky, a constitutional law professor at the University of Southern California, the number of prisoner lawsuits "underscores a grim reality of modern prison life: too many inmates, too few cells and too little attention."⁶⁶ In the past twenty years, the prison population, accounting for both state and federal prisoners, has risen from 329,821 to 1,381,892.⁶⁷ Due to the rapid growth in the prison population and a slower increase in the number of cells, prisons now hold "a third more prisoners than they were designed to hold."⁶⁸ The insufficiency of prison space, according to Professor Chemerinsky, provides one explanation for the rise in prison suits. The lawsuits are an extension of "overcrowding and deterioration that is only growing worse."⁶⁹

Prisoner lawsuits may not be as frivolous as described by PLRA proponents. Rather the frivolity may simply be a mischaracterization, or misunderstanding of the cases they cite.⁷⁰ Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit was concerned with the mischaracterizations of prisoner cases by overzealous state

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ SCALIA, *supra* note 36, at 4 tbl. 3 (representing federal and state prison populations from 1980–2000).

⁶⁸ Dunn, *supra* note 21.

⁶⁹ *Id.* One author, who conducted a study for the Harvard Law School Center for Criminal Justice, concluded:

Prison conditions and rules undoubtedly affect the volume of prisoner litigation. As a general proposition, prisoners who live in spacious, clean facilities with good recreational or educational programs and few restrictive behavioral rules are less likely to file federal lawsuits than those who inhabit decrepit and unsanitary buildings, have no programs, and are subject to tyrannical guards and oppressive rules.

Turner, *supra* note 12, at 628.

⁷⁰ See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996).

attorneys' general and decided to look into the underlying facts of the most cited cases. He concluded that some of the most widely cited cases have merit and were just simply mischaracterized.⁷¹ To start, the Peanut Butter Case, according to Judge Newman, was not about getting the wrong kind of peanut butter but about charging a prisoner for something that he never received.⁷² This is diametrically different from the characterization presented by PLRA proponents. During the brief debate prior to the PLRA's passage, its supporters poked fun at another case, describing how prisoners allegedly sued over the lack of a salad bar, to further drive home the point that prisoner lawsuits were a waste of resources.⁷³ This particular case, according to Judge Newman, was not about getting a salad bar, but about dangerously unhealthy prison conditions.⁷⁴ Judge Newman's reassessment of the cases illustrates that the frivolity of some cases may simply be misstated.

C. *Deconstructing Frivolity*

The type of rhetoric espoused by PLRA proponents was subject to criticism even before the enactment of the PLRA. According to Jim Thomas, writing six years before the enactment of the PLRA,

In denigrating prisoner suits, critics tend to use such terms as "litigation explosion," "frivolous suits," "abuse of courts," or "crowding out legitimate claims." Such a vocabulary provides an account-generating mechanism that "explains" a state of affairs that needs "attending to." Account-generating rhetoric tends to replace data, and arguments against prisoner suits are packaged in ways that distort rather than illuminate the nature and processes of prisoner grievances.⁷⁵

⁷¹ See *id.* (expounding on three cases which were deemed frivolous by the attorneys general and yet had merit when the court documents were reviewed carefully).

⁷² See *id.* at 521-22.

⁷³ See 141 CONG. REC. S14628 (daily ed. Sept. 25, 1995) (statement of Sen. Reid) (including the case of the Missouri inmate who sued "because the prison did not have salad bars and brunches on weekends").

⁷⁴ See Newman, *supra* note 70, at 521; see also *Changing the Rules: Prison Officials and Legislators Mount an All-Out War Against Prisoners' Right to Legal Access* ("Health and sanitary issues often get little attention in prisons because of the public perception that sick prisoners get what they deserve."), at <http://www.prisonactivist.org/crisis/plra-update.html> (last visited Nov. 6, 2003).

⁷⁵ See Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*,

The PLRA proponents' mischaracterization of cases distorts the reality of prisoner litigation. The reality is not that all prisoner lawsuits are meritorious, but merely that not all are without merit. Moreover, during the period when prisoners increased filings of lawsuits, there were cases that signified real abuse and not the frivolity cited by PLRA proponents.⁷⁶ Immediately before the passage of the PLRA, female inmates filed a § 1983 suit alleging sexual abuse by prison staff.⁷⁷ PLRA proponents did not mention this case, or any case similar to it, when describing prisoner litigation.

A critical assumption "underlying much of the jurisprudence on prisoner civil rights litigation is that prisoners have the ability to communicate their claim to the federal court."⁷⁸ The fact that most prisoner litigants appear *pro se*, may contribute to the view that prisoner suits are frivolous.⁷⁹ Even though the Supreme Court has established a more liberal standard for *pro se* litigants, it has been assumed that a prisoner possesses the ability to draft a complaint, which would "allow [a] district court to cull out the frivolous claims."⁸⁰ In reality, a prisoner may not possess such ability because "[p]risoners are not of average intelligence."⁸¹ A great deal of prisoners do not have adequate schooling, have learning disabilities, and are "functionally illiterate."⁸² It is not easy for a prisoner to simply draft up a complaint that would communicate the extent of his injuries so that they represent a cognizable legal claim.

15 New ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 29 (1989) (footnote omitted).

⁷⁶ See Robertson, *supra* note 51, at 142.

⁷⁷ See *Women Prisoners v. Dist. of Columbia*, 877 F. Supp. 634, 639–40 (D.D.C. 1994) (describing, among other constitutional violations, a pattern of forcible rape, sodomy, and sexual abuse of female prisoners by prison staff members).

⁷⁸ See Eisenberg, *supra* note 27, at 441.

⁷⁹ See *Prison Litigation Reform Act of 1996: Hearing on S.2838 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (testimony of Sarah Vandenbraak, Former lead counsel for the Philadelphia District Attorney, Wednesday, September 25, 1996) ("In 1994 prisoners filed over 58,000 lawsuits across the United States, with ninety-six percent of those lawsuits filed *pro se*.").

⁸⁰ See Eisenberg, *supra* note 27, at 442.

⁸¹ *Id.*

⁸² See *id.* ("Seventy percent of prison and jail inmates have not completed high school; 40% have learning disabilities; and 75% read at or below the eighth grade level. In 1982, a federal court found that half of the prisoners in Florida prisons were functionally illiterate and 22% were borderline mentally retarded.") (footnotes omitted).

Furthermore, the frivolity of prisoner lawsuits may be examined through the wrong paradigm. Because the prisoner's world is contained within the parameters of four walls, the prisoner's definition of frivolous is distinctly different from that of a non-prisoner. Accordingly, "[w]hat to most people would be a very insignificant [matter] becomes, because of the nature of prison life, a matter of real concern to the inmate."⁸³ To determine frivolity based on the non-prisoner's paradigm of values is mistaken because a non-prisoner's values cannot reflect the reality of prison life.⁸⁴ For instance, PLRA proponents thought the Peanut Butter Case was frivolous because they saw no worth in such mundane things like getting the right kind of peanut butter. To PLRA proponents who do not live in a world severely limited in resources, it may be trivial, but to a prisoner with limited resources, it may mean almost everything.⁸⁵

The increase in the number of lawsuits brought by prisoners may also be attributable to recent changes in the federal and state sentencing guidelines.⁸⁶ In recent years, the federal government and several states have adopted determinate sentencing guidelines and mandatory sentences and have eliminated parole.⁸⁷ These changes have and will further increase the number of defendants sentenced to prison and increase the length of incarceration. Based on the recent changes in the sentencing scheme, "the number of persons confined will continue to grow, with an expected increase in the number of civil rights actions filed by such persons."⁸⁸

⁸³ See *id.* at 438-39 (quoting TENTATIVE REPORT, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 12 (Oct. 6, 1975)).

⁸⁴ *Id.* at 439 ("The rules vary from institution to institution, even within the same system. The rules can be picayune and not uniformly followed. The prison deals so pervasively with the inmates' lives that there are many ways in which disputes may arise.").

⁸⁵ See Newman, *supra* note 70, at 522 (noting that the frivolity associated with the Peanut Butter case may be wrong).

⁸⁶ See Eisenberg, *supra* note 27, at 435 (suggesting that the increased volume of prisoner lawsuits may be attributable to the change from indeterminate sentencing to determinate sentencing).

⁸⁷ See *id.* (noting that as the crime rate increased over the last two decades, legislators concluded that indeterminate sentencing was not working).

⁸⁸ *Id.* at 436.

III. IS MANDATORY EXHAUSTION OF PRISONER CLAIMS A SOLUTION?

In addition to its short legislative history and erroneous underlying assumptions about the nature of prisoner litigation, the PLRA implemented several major changes to filing procedures for prisoner lawsuits. First, an inmate may not proceed *in forma pauperis* without a showing of an "imminent danger of serious physical injury."⁸⁹ Even then, the inmate's suit may be dismissed if the inmate has previously had three suits dismissed for either frivolity, maliciousness, or failure to state a claim.⁹⁰ Second, the PLRA limits the time allowed for prospective relief to two years.⁹¹ Third, the PLRA limits the recovery for psychological injury by requiring a showing of physical injury.⁹² Finally, for an inmate to proceed in federal court, 42 U.S.C. § 1997e(a) mandates that all available administrative remedies be fully exhausted.⁹³

A. *The Exhaustion Requirement*

The PLRA revised 42 U.S.C. § 1997e to make exhaustion of administrative remedies mandatory.⁹⁴ Courts have interpreted this provision as a mandatory precondition to bringing suit in federal court.⁹⁵ The exhaustion of administrative remedies entails that a prisoner litigant must first process his claims through all of the institutional grievance procedures before bringing a suit in federal court.⁹⁶ The supporting rationale

⁸⁹ 28 U.S.C. § 1915(g) (2000).

⁹⁰ *Id.*

⁹¹ 18 U.S.C. § 3626(b)(1) (2000)..

⁹² 42 U.S.C. § 1997e(e) (2000).

⁹³ *Id.* § 1997e(a).

⁹⁴ See PLRA, Pub. L. No. 104-134, § 802, § 7(a), 110 Stat. 1321-66, 1321-77 (1996).

⁹⁵ See, e.g., *Curry v. Scott*, 249 F.3d 493, 501 n.2 (6th Cir. 2001) ("We note, however, that, while it is true we have concluded § 1997e does not impose a jurisdictional bar to federal jurisdiction, we have also concluded that the obligation to exhaust administrative remedies before resort to federal court is a mandatory one.").

⁹⁶ See *id.*; see also *Casanova v. Dubois*, 289 F.3d 142, 146 (1st Cir. 2002). The court in *Casanova* remarked:

Although this is an issue of first impression in this circuit, all federal appellate courts that have considered the question have rejected this jurisdictional argument . . . "we now hold, as has every circuit to have considered the matter, that the PLRA's exhaustion requirement simply governs the timing of the action and does not contain the type of sweeping

behind the provision is that it provides prisoners a faster method of obtaining relief, and if the prisoner receives relief through this method, it minimizes litigation.⁹⁷

B. The Exhaustion Requirement Has Not Lightened the Federal Workload

The exhaustion requirement has not reduced litigation, but rather has generated more litigation interpreting its application. In addition, the mandatory exhaustion requirement has not significantly improved judicial efficiency, and in some areas, it may have actually impeded judicial efficiency. Furthermore, the minimal benefit derived from its enactment is outweighed by the fact that it potentially bars meritorious claims from ever being adjudicated. This result is especially troubling in light of the expansive interpretation afforded the exhaustion requirement in recent Supreme Court decisions.⁹⁸ In *Porter v. Nussle*,⁹⁹ the Supreme Court expanded the application of the PLRA so that the exhaustion requirement applied not only to general prison conditions but also to isolated incidents of excessive force.¹⁰⁰ In *Booth v. Churner*,¹⁰¹ the Supreme Court reinforced the mandatory nature of the exhaustion requirement by necessitating that the prisoner exhaust all administrative remedies regardless of whether the damages sought are actually available through the institution's grievance procedures.¹⁰² Consequently, the exhaustion requirement has had and will

and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements."

Id. (quoting *Ali v. Dist. of Columbia*, 278 F.3d 1, 5–6 (D.C. Cir. 2002)) (alteration in original).

⁹⁷ See Kuzinski, *supra* note 53, at 381 (noting that institutional grievance procedures provide "immediate and less expensive" resolution of prisoner claims).

⁹⁸ See Erwin Chemerinsky, *Barrier to Entry, Recent Rulings Leave Potential Plaintiffs with Valid Claims Out in the Cold* (2002) ("[T]he Supreme Court is closing the courthouse doors. Many with meritorious claims never will have them heard. Illegal behavior will go unremedied and undeterred."), available at <http://www.nslc.org/federalrights/dailyjourn0302.html> (last visited Sept. 3, 2003).

⁹⁹ 534 U.S. 516 (2002).

¹⁰⁰ *Id.* at 532 (holding that the exhaustion requirement applied to "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong").

¹⁰¹ 532 U.S. 731 (2001).

¹⁰² *Id.* at 741 n.6 (holding that "Congress has provided in § 1997e(a) that an inmate must exhaust [all administrative remedies] irrespective of the forms of relief sought and offered through administrative avenues").

have a broader effect on prisoners' rights than it did during its initial enactment.

Prior to the Supreme Court's decision in *Porter*, courts were divided over whether the exhaustion requirement applied to lawsuits involving isolated instances that violated the Eighth Amendment's ban on excess force. Circuit courts were split into two camps: some held that the exhaustion requirement did apply to isolated incidents,¹⁰³ while others held that it did not apply to such incidents.¹⁰⁴ For those circuits that did not speak to the issue, there were intra-circuit splits, such as within the Second Circuit, where some of the district courts held that the exhaustion requirement did apply to isolated instances of excessive force,¹⁰⁵ while others concluded that it did not apply.¹⁰⁶

When this issue finally reached the Second Circuit, the court held in *Nussle v. Willette*¹⁰⁷ that the exhaustion requirement under the PLRA only applied to suits regarding general conditions of prison life and not to isolated incidents of constitutional violations.¹⁰⁸ The Supreme Court disagreed with

¹⁰³ See, e.g., *Booth v. Churner*, 206 F.3d 289, 293–98 (3d Cir. 2000) (concluding that excessive force claims are actions “brought with respect to prison conditions” under § 1997e(a)); *Freeman v. Francis*, 196 F.3d 641, 643–44 (6th Cir. 1999) (concluding the same).

¹⁰⁴ See, e.g., *Baskerville v. Goord*, No. 97 CIV. 6413(BSJ), 1998 WL 778396, at *3 (S.D.N.Y. Nov. 5, 1998) (holding that the exhaustion requirement “does not apply to allegations of excessive force or assault by prison officials”); *White v. Fauver*, 19 F. Supp. 2d 305, 313–15 (D.N.J. 1998) (finding that the exhaustion requirement “does not apply to allegations of excessive use of physical force”).

¹⁰⁵ See, e.g., *Cuoco v. United States Bureau of Prisons*, No. 98 CIV. 9009(WHP), 2000 WL 347155, at *3–5 (S.D.N.Y. Mar. 31, 2000) (discussing how the exhaustion requirement does apply to excessive force claims); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000) (concluding that “excessive force claims must be administratively exhausted”); *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 888–92 (S.D.N.Y. 1998) (describing other courts' arguments for why the exhaustion requirement might not apply but finding them unpersuasive).

¹⁰⁶ See, e.g., *Tolliver v. Wilson*, No. 99 CIV. 9555(JGK), 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) (concluding that “prison conditions” did not encompass particular incidents of assault or use of excessive force); *Giannattasio v. Artuz*, No. 97 CIV. 7606 RP KNF, 2000 WL 335242, at *11–12 (S.D.N.Y. Mar. 20, 2000) (explaining why the PLRA does not apply); *Royster v. United States*, No. 98 Civ. 4109, 1999 WL 1567734, *3–4 (S.D.N.Y. Nov. 23, 1999) (deciding that the exhaustion requirement did not apply to the claim); *Wright v. Dee*, 54 F. Supp. 2d 199, 205–06 (S.D.N.Y. 1999) (stating that inmates do not need to exhaust remedies with an excessive force claim); see also *Peddle v. Sawyer*, 64 F. Supp. 2d 12, 15–16 (D. Conn. 1999); *Carter v. Kiernan*, No. 98 Civ. 2664 (JGK), 1999 WL 14014, at *2–5 (S.D.N.Y. Jan. 14, 1999); *Baskerville*, 1998 WL 778396, at *2–5.

¹⁰⁷ 224 F.3d 95 (2d Cir. 2000).

¹⁰⁸ *Id.* at 97. Ronald Nussle was a prisoner who sued the Connecticut

the Second Circuit and overruled *Willette* in *Porter v. Nussle*,¹⁰⁹ holding that the exhaustion requirement applied to all inmate suits about prison life, regardless of "whether they involve general circumstances or particular episodes."¹¹⁰ This decision made it mandatory for all prisoner lawsuits to pass this initial threshold of filing administrative claims with their institutions, and in effect expanded the reach of the exhaustion requirement.

When Congress implemented the PLRA, it failed to define the term "administrative remedies . . . available" within the statute, and it did not provide legislative history to guide courts in interpreting this term.¹¹¹ This omission prompted a great deal of litigation to determine its definition. The importance of the term is clear because whether or not an inmate is required to fulfill the exhaustion requirement hinges on the precise statutory phrase "administrative remedies . . . available." As a result of congressional silence, the issue that divided the circuits was whether a prison litigant needed to exhaust the administrative remedies provided by an institution if such procedures did not provide the specific relief sought, in particular, money damages.¹¹²

Prior to the resolution of the issue in *Booth v. Churner*, the Third, Sixth, and Eleventh Circuits held that exhaustion was still required even if the procedures did not provide the relief requested by the prisoner litigant.¹¹³ The Fifth, Ninth, and Tenth Circuits concluded the opposite.¹¹⁴ This issue divided the

Department of Corrections over an incident arising on June 15, 1996. *Id.* Nussle claimed that on that date correction officers Willette and Porter entered his cell and proceeded to beat him without justification. *Id.* The correction officers allegedly beat Nussle to the point where he lost control of his bowels and sustained a series of physical injuries. *Id.*

¹⁰⁹ 534 U.S. 516, 530–32 (2002).

¹¹⁰ *Id.* at 532.

¹¹¹ See *Booth v. Churner*, 532 U.S. 731, 737–39 (2001) (discussing the possible intent of Congress for the phrase "administrative remedies . . . available").

¹¹² See *Willette*, 224 F.3d at 100 n.5 (listing cases from different circuits and noting how courts divided).

¹¹³ See, e.g., *Nyhuis v. Reno*, 204 F.3d 65, 71–73 (3d Cir. 2000) (concluding that exhaustion was required even if it did not provide for the specific relief requested); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999) (concluding that exhaustion was required); *Alexander v. Hawk*, 159 F.3d 1321, 1325–27 (11th Cir. 1998) (concluding the same).

¹¹⁴ See, e.g., *Rumbles v. Hill*, 182 F.3d 1064, 1069 (9th Cir. 1999) ("Exhaustion of administrative remedies under section 1997e(a) is not required if a prisoner's section 1983 claim seeks only money damages and if the correctional facility's administrative grievance process does not allow for such an award."); *Whitley v.*

district courts within the Seventh Circuit.¹¹⁵ The Supreme Court in *Booth* resolved the split and held that the exhaustion requirement also applied in situations when the institutional grievance procedures do not specifically provide for the relief sought.¹¹⁶ This result highlights the ministerial nature of the exhaustion requirement. Although it may be clear from the outset that exhaustion will not remedy the inmate's injuries, the inmate would still have to undergo the procedural hurdles set in place by the exhaustion requirement.

The Supreme Court's holdings in *Porter* and *Booth* expanded the application of the exhaustion requirement to every inmate suit regarding prison life, regardless of the form of relief sought.¹¹⁷ Because of the expansive reach of the exhaustion requirement, it is important that the provision be effective and not produce the undesired consequence of barring potentially meritorious claims. Congress enacted the exhaustion requirement as a procedural filter for frivolous prisoner claims and not as an impediment for all prisoner claims.¹¹⁸ Therefore, the intended purpose of the exhaustion requirement must be juxtaposed with its effect to see whether it has served its purpose, as well as whether the gains from the procedural barrier outweighs the negative ramifications.

The crux of the PLRA proponents' argument is that frivolous lawsuits are a huge burden on society because they waste valuable judicial and legal resources.¹¹⁹ Despite the goals of the

Hunt, 158 F.3d 882, 886–87 (5th Cir. 1998) (“Congress did not intend to require the exhaustion of unavailable remedies.”); *Garrett v. Hawk*, 127 F.3d 1263, 1266–67 (10th Cir. 1997) (allowing a futility exception and required exhaustion only when a remedy was actually available).

¹¹⁵ See *Massey v. Helman*, 196 F.3d 727, 733–34 (7th Cir. 1999) (holding that exhaustion is required); cf. *Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) (“It is possible to imagine cases in which the harm is done and no further administrative action could supply any ‘remedy.’”).

¹¹⁶ 532 U.S. at 740–41 (2001) (holding that “Congress has mandated exhaustion [of administrative remedies] . . . regardless of the relief offered through administrative procedures”).

¹¹⁷ See *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth*, 532 U.S. at 740–41.

¹¹⁸ See, e.g., 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (“Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.”).

¹¹⁹ See *id.* (“It is time to stop this ridiculous waste of taxpayers' money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens.”); see also 141 CONG.

PLRA, the exhaustion requirement has actually impeded judicial efficiency rather than promoting it. One of the consequences of its mandatory nature is that it wastes judicial resources because it requires an inquiry into the exhaustion requirements when the case could have already been disposed of on its merits.¹²⁰ Another problem is that it wastes judicial resources by requiring the dismissal and subsequent re-filing of a case, provided the exhaustion requirements are satisfied during the pending suit.¹²¹ Moreover, the exhaustion requirement can delay a time-sensitive claim of a constitutional violation, such as where the relief requested is an injunction against prison officials.

The main purpose of the PLRA, as carried out by the exhaustion requirement, is to lower the number of frivolous prisoner lawsuits filed in federal court.¹²² The exhaustion requirement, however, has not ameliorated the congested federal dockets. To the contrary, the exhaustion requirement may have complicated ordinary proceedings even more, resulting in the increased expenditure of more judicial resources. Take for example *Rodriguez v. Ghoslaw*.¹²³ After the district court granted summary judgment on the merits to the defendant corrections officers and prison officials in a § 1983 suit brought by a New York State prisoner, the Second Circuit remanded the case for an additional inquiry into exhaustion.¹²⁴ In *Rodriguez*, not only did the exhaustion inquiry create additional work for the judiciary, but "[i]f [the] plaintiff failed to exhaust, the resulting dismissal would be without prejudice to his re-filing this meritless claim after exhausting the grievance procedures."¹²⁵ A dismissal without prejudice entitles the

REC. S14628 (daily ed. Sept. 29, 1995) (statement of Sen. Reid) ("But, basically, without going into a lot of detail, it would stop this kind of foolishness. This foolishness costs tens of millions of dollars throughout the States. The taxpayers finance this litigation."); 141 CONG. REC. S7524 (daily ed. May 5, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population The bottom line is that prisons should be prisons, not law firms.").

¹²⁰ See, e.g., *Rodriguez v. Ghoslaw*, No. 98 CIV. 4658(GEL), 2002 WL 1424586, at *3 (S.D.N.Y. June 28, 2002).

¹²¹ See *id.*

¹²² See *supra* note 119.

¹²³ No. 98 CIV. 4658 (GEL), 2002 WL 1424586 (S.D.N.Y. Jun. 28, 2002).

¹²⁴ *Id.* at *1.

¹²⁵ *Id.* at *2.

plaintiff to re-file the same claim, and therefore, requires the district court to decide the same case twice when it had already decided that the case lacked merit.¹²⁶ Not only does this result wreak havoc on an already congested docket, it also counters the very objective of the PLRA—to reduce the waste of judicial and legal resources.

*Hicks v. Monteiro*¹²⁷ is another example of where the exhaustion requirement works contrary to the stated goals of the PLRA. In *Hicks*, the only effect of the exhaustion requirement was to impede a meritorious claim brought by a prison litigant from proceeding in federal court. Hicks, the plaintiff, was a prisoner at Salinas Valley State Prison who filed a pro se complaint alleging violations of his civil rights pursuant to 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act of 1990 (ADA), codified as 42 U.S.C. § 12101 et. seq.¹²⁸ Hicks alleged that he had a severe leg injury, which required the use of a walking stick or wheel chair, but prison officials would provide him with neither and did not install rails in the showers or cell.¹²⁹ Hicks alleged that because the prison officials did not provide him with the requested facilities, he fell stepping out of the shower and injured himself.¹³⁰ Judge Walker, writing for the Northern District of California, dismissed Hicks's case despite noting that the allegations stated a cognizable claim under § 1983 and the ADA because Hicks failed to exhaust fully the available administrative remedies of the prison prior to filing the federal claim as mandated under the PLRA.¹³¹ Hicks had fully exhausted the administrative remedies only after initiating his

¹²⁶ The *Rodriguez* Court went on to elaborate on the absurdity of the outcome when it stated:

Defendant could have chosen to expressly waive the non-exhaustion issue and move instead for restoration of the summary judgment in his favor on the merits. Instead, he seeks a dismissal without prejudice. Under the PLRA, he is entitled to that remedy. Accordingly, the plaintiff's claim against defendant Ghoslaw is dismissed without prejudice to future litigation on the same cause of action after exhaustion of any available administrative remedies.

Id. at *3.

¹²⁷ No. C 00-2254VRW(PR), 2002 WL 654086 (N.D. Cal. Apr. 11, 2002).

¹²⁸ *Id.* at *1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *1, 2.

federal claim, but this did not fit within the statutory definition of precondition under the exhaustion requirement.¹³²

Ultimately, Hicks was denied relief through the institutional grievance procedures too late, and therefore, his federal case was dismissed.¹³³ This result does not coincide with the PLRA's intended goal of promoting judicial efficiency because the net result requires Hicks to re-file the same case for a second examination of the merits.

C. *Barring Meritorious Claims*

Beside being a waste of time, it may not seem significant that a prisoner-litigant must re-file his claim after dismissal for failure to exhaust administrative remedies. However, the delay of certain prisoner claims may in effect be a denial of relief. Prisoners seek both monetary damages and injunctive relief in a § 1983 claim.¹³⁴ If a prisoner is only seeking injunctive relief, time is of the essence for this prisoner. During the time-frame in which relief is delayed, it is actually a denial of relief because the abuse continues. Among the most frequently alleged violations of the Eighth Amendment is the denial of adequate medical care.¹³⁵ Prisoners who are denied medical treatment after seeking such treatment for months or years "will file a civil rights action in desperation" to obtain it.¹³⁶ To mandate that such prisoner wait until the exhaustion requirement and litigation are complete to receive medical attention is in effect a denial of relief.

In some instances, a prisoner's claim may be precluded all together if the statute of limitations for the § 1983 claim expires while the prisoner was exhausting his administrative remedies. Federal courts apply the statute of limitations of the relevant states for § 1983 claims,¹³⁷ and the different state statutes of

¹³² *Id.* at *2.

¹³³ *Id.* at *2 n.1, 3.

¹³⁴ See Turner, *supra* note 12, at 623-24 (1979) (stating that in some states more prisoners sued for injunctive relief, while in others they sued for monetary relief).

¹³⁵ See Eisenberg, *supra* note 27, at 439 ("One of the greatest areas of prisoner complaints in federal court is inadequate medical care.").

¹³⁶ *Id.* at 440.

¹³⁷ See *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (noting that federal courts borrow the relevant state's statute of limitations for § 1983 claims).

limitations for such claims range from one year to three years.¹³⁸ Many courts have held that the statute of limitations is tolled while a prisoner-litigant is exhausting his administrative remedies,¹³⁹ but there are still those courts that have not addressed the issue, leaving the status of the prisoner's claims unclear.¹⁴⁰ Given the complex nature of certain grievance procedures and the relatively short statute of limitations, prisoner-litigants with meritorious claims can be precluded from ever bringing suit. Not even proponents of the PLRA wanted to bar meritorious claims,¹⁴¹ and Congress did not intend for the PLRA to bar such claims.

The mandatory nature of the exhaustion requirement also bars meritorious claims in situations where the grievance procedure is not clearly established. For instance, the penal institution may not have a delineated grievance procedure. Therefore, prisoners may not be able to exhaust the remedies because they will not know how to proceed administratively and instead will file suit. In response, defendants will raise non-exhaustion as a basis for dismissal and thereby preclude relief for a meritorious claim. A sound example of this potential abuse is *Aldridge v. Gill*,¹⁴² in which Samuel Aldridge, a pro se prisoner, filed a claim under § 1983 seeking money damages against the Judge Executive of McCracken County, Kentucky and several prison officials at the McCracken County Regional

¹³⁸ See, e.g., *Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) (noting that plaintiffs' § 1983 claims for violation of his Eighth Amendment rights are governed by Texas' two-year statute of limitations); *Hayes v. N.Y.S. D.O.C. Officers*, No. 97 Civ. 7383 MBM, 1998 WL 901730, at *3 (S.D.N.Y. Dec. 28, 1998) (stating that in New York, the relevant statute of limitations is three years from the date on which the action accrued).

¹³⁹ See, e.g., *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir. 1992) (concluding that, in a prisoner civil rights suit, the Texas statute of limitations was tolled while the prisoner exhausted administrative remedies); *Howard v. Snyder*, No. 01-376-SLR, 2002 U.S. Dist. LEXIS 9084, at *4 (D. Del. May 14, 2002) (concluding that exhaustion of administrative remedies tolled the statute of limitations for the prisoner's § 1983 claim).

¹⁴⁰ See, e.g., *Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001) (declining to decide in the first instance whether the exhaustion requirement under 42 U.S.C. § 1997e(a) would operate to toll the statute of limitations).

¹⁴¹ See, e.g., 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.").

¹⁴² 47 Fed. Appx. 751 (6th Cir. 2002).

Jail for alleged constitutional violations.¹⁴³ The district court entered judgment in favor of the defendants because the plaintiff failed to exhaust his administrative remedies.¹⁴⁴ On appeal, the Court of Appeals for the Sixth Circuit held that it was unclear whether administrative remedies were even "available" because plaintiff alleged that he was never informed of a grievance process, and defendants merely asserted that a grievance procedure existed without ever substantiating to the district court what this process entailed. Thus, the district court never resolved this matter.¹⁴⁵ The district court's holding is especially troubling in light of the merits of Aldridge's case, which prompted an investigation by the federal civil rights division, which confirmed that his claim was in fact meritorious.¹⁴⁶

The *Aldridge* decision indicates that prisoner litigation can be meritorious and that the exhaustion requirement makes it unnecessarily difficult to obtain relief. Although Aldridge could simply re-file his case, he would first have to determine how to exhaust grievance procedures that were unclear and unsubstantiated, possibly precluding him from filing a future claim.¹⁴⁷ If there was no grievance procedure, Aldridge could re-file his claim based on the argument that there was no available administrative procedure, but the success of this argument depends on which party has the burden of proving exhaustion.

Courts disagree over who has the burden of raising the issue of whether exhaustion has been fulfilled. Some courts hold that

¹⁴³ The complaint, dated January 18, 2000, alleged that

1) the defendants were deliberately indifferent to [the plaintiff's] serious medical needs in violation of the Eighth Amendment; 2) the defendants violated his right of access to the courts in violation of the First Amendment; 3) [plaintiff] was housed in a segregation cell for fourteenth months without reason and in violation of the Fourteenth Amendment; and 4) [plaintiff] was kept at the jail in excess of the state statutory time limit before being transferred to a state prison.

Id. at 751-52.

¹⁴⁴ See *id.* at 752 (noting that the complaint was also untimely).

¹⁴⁵ See *id.* at 752-53 (finding that the deficiencies in the grievance process "prompted an investigation by the United States Department of Justice and a settlement agreement").

¹⁴⁶ *Id.* at 753 ("Eventually, Plaintiff was successful in convincing the federal civil rights division to investigate his allegations. In November, 1998 and January, 1999, Mr. Lee toured the MCRJ to investigate the deplorable conditions there . . . Mr. Lee confirmed that the complaints were meritorious . . ." (quoting Aldridge in his requests for administrative relief)).

¹⁴⁷ See *id.* at 752 (noting that the circuit court remanded the case for inquiry into whether there was a grievance procedure available).

plaintiffs have the burden of pleading that exhaustion has been completed,¹⁴⁸ while other courts hold that the exhaustion requirement is an affirmative defense to be raised by defendants and is therefore waiveable.¹⁴⁹ The difference between the two approaches is significant. A plaintiff who has the burden of proving that the exhaustion requirement has been satisfied is subject to *sua sponte* dismissal if the court finds this burden has not been met. In a jurisdiction where the requirement is an affirmative defense, however, if the defendant fails to raise the issue, a prisoner's case can bypass the exhaustion requirement and proceed regardless of whether the prisoner has in fact utilized all available administrative remedies. This difference in interpretation of the exhaustion requirement effectively provides for two very different treatments of a prisoner's suit and of the statutory provision itself. The Supreme Court has not resolved this split, so in the interim, it will be subject to more speculation and rationalization by the different courts.

Aldridge also highlights the issue, discussed above, of whether exhausting administrative remedies tolls the statute of limitation for a § 1983 claim. In *Aldridge*, the circuit court remanded the case for consideration of whether exhaustion had tolled Aldridge's federal claim.¹⁵⁰ Thus, not only did Aldridge have to wait to exhaust his administrative remedies and then re-file the suit, but he also faced the possibility of never getting his day in court if the statute of limitations expired.¹⁵¹ The procedural hurdles imposed by the exhaustion requirement may also preclude meritorious claims because, by the time the

¹⁴⁸ See *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (holding that prisoners need to plead claims with specificity and show that they have exhausted administrative remedies); *Fisher v. Wickstrom*, No. 00-1162, 2000 WL 1477232, at *1 (6th Cir. Sept. 25, 2000) (indicating that before the court will address any claim set forth in the plaintiff's complaint, it must be shown that the plaintiff complied with the exhaustion requirement and if any complaint contains both exhausted and unexhausted claims, the court "may address the merits of the exhausted claims and dismiss only those that are unexhausted"); *Simpson v. Gallant*, 231 F. Supp. 2d 341, 350-51 (D. Me. 2002) (noting that Simpson, the prisoner, had "adequately pled exhaustion").

¹⁴⁹ See *Ray v. Kertes*, 285 F.3d 287, 293, 295 (3d Cir. 2002) (noting that the Second, Seventh, Ninth, and D.C. circuits have also so held). The *Kertes* court found that it is easier for prison officials to show that the prisoner has not exhausted all avenues since they have access to the necessary documents. *Id.* at 295.

¹⁵⁰ *Aldridge*, 47 Fed. Appx. at 753.

¹⁵¹ See *id.* at 752-53 (noting that the "statute of limitations is tolled [only] during the time the prisoner pursues administrative remedies").

prisoner's case is dismissed by a federal court and he figures out there is a grievance procedure, the prisoner may simply give up.¹⁵²

The purpose of the PLRA, and its policy implementation through procedural devices such as the exhaustion requirement, was not to bar meritorious claims. Senator Hatch, a staunch supporter of the PLRA, explicitly stated that "[i]ndeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the [f]ederal judicial system."¹⁵³ Despite this admission, the exhaustion requirement does not distinguish between meritorious claims and unmeritorious claims; instead, it broadly covers all prisoner lawsuits.¹⁵⁴ Moreover, the effect of the mandatory exhaustion requirement is to inhibit both meritless and legitimate claims.

D. The Institution's Right to Address Prison Problems Before Litigation

The exhaustion requirement was also intended to serve as notice for the prisons and to give such institutions the opportunity to redress their inmates' concerns thereby minimizing the need for litigation.¹⁵⁵ There are times, however, when this goal is outweighed by the need for judicial relief. This need is particularly apparent in situations of systemic abuse of prisoners, because the constitutional violations are so widespread that the institutions are already put on notice of the situation prior to the commencement of any litigation.¹⁵⁶ In a

¹⁵² See *Mendez v. Artuz*, 01 Civ. 4157(GEL), 2002 U.S. Dist. LEXIS 3263, at *5 (S.D.N.Y. Feb. 27, 2002) (recognizing that the procedural hurdles for a prisoner's complaint may discourage and tire a plaintiff).

¹⁵³ 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

¹⁵⁴ See Winslow, *supra* note 41, at 1678-80 (indicating that the physical injury requirement serves to bar meritorious claims because they are based on emotional or mental claims).

¹⁵⁵ See Kuzinski, *supra* note 53, at 381 (noting that mandating inmates to turn first to less expensive methods of resolution, such as institutional grievance procedures, may increase chances that simple disputes may be resolved without involving litigation).

¹⁵⁶ See, e.g., *Noguera v. Hasty*, 99 Civ. 8786 (KMW)(AJP), 2000 U.S. Dist. LEXIS 11956, at *8-12 (S.D.N.Y. July 21, 2000) (detailing the sexual abuse of prison inmates and indicating that prison officials, including the warden, were aware of the conduct).

situation of overt abuse of prisoners by prison officials, this interest cannot prevail over a prisoner's injuries because the nature and frequency of abuse suffices to put prison administrators on notice that they should take action.¹⁵⁷

IV. THE SOLUTION

The problems posed by the exhaustion requirement can be easily remedied by giving judges discretion over what constitutes exhaustion under specified guidelines. A judge should be allowed to forego the requirement in the following situations: (1) if the case has already been dismissed based on the merits; (2) if administrative remedies are fully exhausted during the pending lawsuit; and (3) if there is a time-sensitive claim alleging violation of a constitutional right, in which it is clear that administrative procedures would not be able to provide relief. The imposition of a mandatory exhaustion requirement in these instances would be contrary to legislative intent. This solution is not mandating a radical departure from the current state of the provision but is merely asserting a "fine-tweaking" of some of its weaknesses.

To impose a mandatory exhaustion requirement on all prisoner litigation may deter some frivolous claims, but this minimal gain is obtained at the cost of closing out the only available forum for prisoners who suffer egregious abuse at the hands of their keepers. In light of the guarantees of the Eighth Amendment, closing the federal courts as a forum in order to improve efficiency, while allowing prisoners to be abused, is not a sound trade-off.

Furthermore, because the PLRA was enacted based on certain misconceived notions about prisoner litigation, it cannot serve its intended purpose of weeding out frivolous claims, nor of lightening the federal workload.¹⁵⁸ More importantly, it has the effect of barring potentially meritorious claims, which it explicitly was not supposed to do. The proposed solution to the problems associated with the exhaustion requirement under the PLRA is to do away with the mandatory nature of the provision

¹⁵⁷ See *id.* at *8-9, *36-37 (stating that, although the inmate did not follow formal grievance procedures, her oral and written complaints put both the institution and the Bureau of Prisons in Washington on notice regarding the sexual abuse).

¹⁵⁸ Herman, *supra* note 9, at 1231.

and to give judges discretion. The shifting of power is important because judges are familiar with the specific facts of a claim and are in the best position to make a judgment over whether or not exhaustion would serve any purpose. Judges can discern a meritorious claim from one that is frivolous, but a mandatory exhaustion requirement cannot do the same.

To grant judges discretion under limited circumstances does not undermine the goals of the PLRA. Furthermore, judges' personal interests are aligned with the goal of the PLRA because they are the ones who have to deal with frivolous lawsuits that consume their workload.

CONCLUSION

Although this Note deals solely with the question of whether a procedural device is as effective as it can be, it does not ignore the fact that the substantive nature of certain prisoners' claims warrants attention. Pervasive abuse of prisoners continues despite constitutional guarantees, and efforts to promote superficial guarantees of judicial efficiency have chipped away at these constitutional protections. The right of access to the courts is a fundamental right for the average citizen, but this right is even more important to incarcerated individuals. For prisoners, the courts are the sole forum for the vindication of their retained rights.

The exhaustion requirement may be precluding more than cases like the Peanut Butter Case. It may be silencing and destroying one of the only avenues of relief that a prisoner may have. As one commentator has noted:

The inmate, a classic 'deviant' whom the modern state separates, isolates, and controls absolutely, must seek relief from non-traditional quarters. Even more so than other political minorities for whom some measure of progress has been made in improving accountability and influence, the courts remain for these despised individuals "the sole practical avenue open to . . . petition for redress of grievances."¹⁵⁹

According to Keith Ploladian, a New York State inmate, "in the bleak world of prison, being able to sue is one of the few ways

¹⁵⁹ See Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 896 (2002) (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

for prisoners to exert some control over their environment. It gives [prisoners] a way to be heard . . . Without this, you might as well pull out the bullwhip and go back to the ball and chain."¹⁶⁰ For prisoners, prison litigation may be the sole outlet they have left to redress their grievances. Angry prisoners who feel hopeless about the situation they face in prison have no incentive to comply with rules of the institution. To allow prisoners to retain the right to sue over aspects of prison life may also be beneficial to the maintenance of some degree of order and civility in prisons.

¹⁶⁰ See Dunn, *supra* note 21.

